Toffoloni v. LFP Publishing Group, LLC

Doc. 12

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHER DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the ESTATE OF NANCY E. BENOIT,	)	
	)	CASE NO. 1:08-cv-00421-TWT
Plaintiff,	)	
vs.	)	
LFP PUBLISHING GROUP, LLC d/b/a Hustler Magazine, MARK SAMANSKY, an individual, and other distributors and sellers of Hustler Magazine, as Defendants X, Y, and Z,	)	
Defendants.	)	

REPLY BRIEF SUPPORTING DEFENDANT LFP PUBLISHING GROUP, LLC'S MOTION TO DISMISS

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TABLE OF CONTENTS

Page

TABLE OF CASES ii

STATEMENT 1

ARGUMENT

POINT I PLAINTIFF'S RIGHT OF PUBLICITY CLAIM AGAINST DEFENDANT LFP SHOULD BE FACIALLY DISMISSED 4

CONCLUSION 11

TABLE OF CASES

Cases **Page**

Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1965 (2007) 4,5

Cabaniss v. Hipsley, 114 Ga.App. 367 (1966) 5,6

Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99 (1957) 4

Martin Luther King, Jr., Center v. American Heritage Products,
250 Ga. 135 (1982) 7

McQueen v. Wilson, 117 Ga.App. 488 (1968),
reversed on other grounds, 224 Ga. 420 (1968) 6

Oxford Asset Mgt., Ltd. v. Jaharis, 297 F.3d 1182 (11th Cir. 2002) 5

Reno v. American Civil Liberties Union,
520 U.S. 844, 117 S.Ct. 2329 (1977)..9

Semerenko v. Cendant Corp., 223 F.3d 165 (3d Cir. 2000)..................................4

Titan Sports, Inc. v. Comics World Corp.,
870 F.2d 85 (2d Cir. 1989) 8,9

Waters v. Fleetwood, 212 Ga.App. 161 (1956)..6

Zacchini v. Scripps-Howard Broadcasting Co.,
433 U.S. 562, 97 S.Ct. 2849 (1977)..8

STATEMENT

Defendant LFP Publishing Group, LLC ("LFP") submits this Reply Brief in response to the opposing Brief of Plaintiff Maureen Toffoloni ("Toffoloni"), Administrator of the Estate of her daughter Nancy Benoit ("Benoit"). Plaintiff opposes the instant motion of Defendant LFP to dismiss this action on the face of the pleadings pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim for relief as a matter of law.

Plaintiff's instant action primarily purports to assert a claim for violation of decedent Benoit's posthumous right of publicity pursuant to the common law of the State of Georgia. Plaintiff also attempts to assert a claim for a permanent injunction against LFP's further publication of fully or partially nude photographs of decedent Benoit, but that claim is moot, since the subject photos of Benoit were published in January 2008 in the March 2008 issue of *Hustler Magazine*, an event that occurred several months ago.[1]

The facts in this matter are not in dispute. Some two decades ago, decedent Benoit, an aspiring model, knowingly posed for nude photographs and a videotape for Defendant Mark Samansky ("Samansky") (Complaint, ¶¶ 9-11), a non-party to this motion who has filed for bankruptcy. Plaintiff alleges that after Benoit

[1] Plaintiff concedes that its first claim for a temporary restraining order against publication of the subject article and photographs is moot and no longer at issue. Plaintiff's Memorandum (hereinafter "Pls. Mem.."), p.2, footnote 1.

changed her mind about publishing the nude photographs of herself, she asked Samansky to destroy the photos and tape, and he told her he had done so (Complaint, ¶¶ 12-13). In reality, Samansky apparently saved the videotape of the photoshoot for some 20 years, and upon Benoit's highly publicized and untimely death, conveyed the rights to publish photographs he made from the videotape to Defendant LFP (Complaint, ¶¶ 16-17). LFP then decided to publish an article on the life and death of Benoit, including fully nude photos of Benoit taken from the Samansky photoshoot, in the March 2008 issue of *Hustler Magazine*. Counsel for Plaintiff then wrote to LFP requesting that the photos not be published, but by the time a letter from counsel for Plaintiff was received by LFP, the subject photos and article on Benoit (Complaint, Exhibit A; Temporary Restraining Order Hearing, February 8, 2008, Transcript, p.3, Plaintiff's Exhibit 1) had already been published nationally in *Hustler*.

Procedurally, Plaintiff attempted to obtain a temporary restraining order in Georgia Superior Court, and LFP removed the case to this Court based on diversity of citizenship (Pls. Mem., p.4). Plaintiff's motion for a temporary restraining order was denied by this Court at a February 8, 2008 hearing, for failure to demonstrate the likelihood of success on the merits, and again based on mootness of the claim.

LFP reiterates its request for a dismissal of this action on the face of the pleadings, since the Georgia right of publicity only encompasses a commercial use of a person's name, picture or likeness, as opposed to the instant newsworthy story of public interest. Here, the subject photographs of decedent Benoit, a conceded model, professional woman wrestler and public figure (Complaint, ¶ 15; Pls. Mem., p.3), were admittedly part of a news story of substantial public interest (Pls. Mem., p.10), and therefore outside the scope of the Georgia right of publicity. Moreover, even if Georgia purported to afford such a right of publicity to Plaintiff's decedent, it would be superseded by LFP's right to publish same as a news story, pursuant to the guarantee of Freedom of the Press afforded it by the First Amendment to the United States Constitution.

POINT I

PLAINTIFF'S RIGHT OF PUBLICITY CLAIM AGAINST DEFENDANT LFP SHOULD BE FACIALLY DISMISSED

Apparently recognizing the weakness of her substantive claim under the Georgia common law right of publicity, Plaintiff Administrator is forced to rely on the purportedly difficult standards of a dismissal motion pursuant to Rule 12(b)(6). Accordingly, Plaintiff asserts that such a motion can only be granted if "it appears *beyond doubt* that the Plaintiff cannot prove *any set of facts* consistent with the allegations that will entitle the Plaintiff to relief," citing, Semerenko v. Cendant Corp., 223 F.3d 165, 173 (3d Cir. 2000)[Pls. Mem., p.5; italics in original].

The foregoing standard of pleading asserted by Plaintiff is based on the old "no set of facts" standard of the formerly leading case of Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99 (1957). However, that criteria is no longer the law. In Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1965 (2007), the majority per Justice Souter wrote extensively on the "no set of facts" language of Conley, stating that on a literal reading thereof, "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." 127 S.Ct. at 1968. The Court then stated: "Conley's 'no set of facts' language has been questioned, criticized and explained away long enough." 126 S.Ct. at 1969.

The Court then concluded:

> After puzzling the profession for 50 years, this familiar observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard .... (127 S.Ct. at 1969)

Accordingly, that overly broad statement of the Rule 12(b)(6) standard for granting a motion to dismiss should no longer be followed. As stated in LFP's original Brief, "conclusory allegations, unwarranted deductions of fact or legal conclusions masquerading as facts will not prevent dismissal." Oxford Asset Mgt., Ltd. v. Jaharis, 297 F.3d 1182, 1188 (11th Cir. 2002). Here, Plaintiff cannot meet her burden of pleading a viable cause of action for a violation of decedent's right of publicity.

In support of her claim, Plaintiff cites on the merits Cabaniss v. Hipsley, 114 Ga.App. 367 (1966), an action for violation of Hipsley's right of privacy where her photograph was published in defendant magazine (Pls. Mem. pp. 5-6). There, an unauthorized picture of plaintiff, an exotic dancer, was placed in "Gay Atlanta" magazine, advertising Atlanta's Playboy Club. The court held that there was no cause of action against the magazine under any theory, since it merely published an ad submitted to it. However, with regard to the private club, on remand the jury could find liability for an appropriation of plaintiff's picture for purposes of advertising.

There, plaintiff's name and likeness was used for a clearly commercial purpose without her authorization – a specific advertisement for a private club. The Georgia Court of Appeals set forth the requirement for such a claim that the appropriation of plaintiff's picture must be for the commercial benefit of the defendant (114 Ga.App. at 381). Clearly Cabaniss, involving an outright commercial advertisement using plaintiff's picture, is a far cry from the instant case featuring decedent Benoit in a news article.

Plaintiff next asserts McQueen v. Wilson, 117 Ga.App. 488 (1968), reversed on other grounds, 244 Ga. 420 (1968), upholding the right of actress Butterfly McQueen to recover damages for the unauthorized use of her photograph (Pls. Mem., pp. 6-7). In McQueen, the defendant, without authorization by the plaintiff, used her name and picture to sell postcards, movie slides, home movies, and a souvenir booklet. (117 Ga.App. at 489). Once again, such unauthorized use of plaintiff's name and likeness was used for the direct financial gain of the defendant; a commercial use affording a cause of action, rather than merely being part of a news article, as in the instant case.

Plaintiff does not attempt to distinguish the decision of the Georgia Supreme Court in Waters v. Fleetwood, 212 Ga.App. 161 (1956), discussed in LFP's original Brief at pp. 8-9, denying liability where defendant newspaper published photographs of plaintiff's murdered 14-year old daughter in a partially decomposed state. The Court held that on a matter of public interest or investigation, a publication therein, including relevant photographs, simply cannot violate the right of privacy. 212 Ga. at 167.

Plaintiff does cite Martin Luther King, Jr., Center v. American Heritage Products, 250 Ga. 135 (1982), for recognizing the Georgia common law right of publicity and affording posthumous rights therein (Pls. Mem.. pp.7-8). As stated in LFP's original Brief, in King, defendant sold an unauthorized bust of Dr. King for its direct financial benefit and commercial purpose, rather than using his photograph in a news article (LFP original Brief, pp.9-10).

Plaintiff's principal legal argument revolves around her purported establishment of a *prima facie* case for violation of the right of publicity. Therein, plaintiff asserts that the required elements are the use of the owner's name, likeness or image; without the owner's consent; for a commercial use or benefit (Pls. Mem., p.8). On this motion, LFP does not dispute Plaintiff's allegations that the image of decedent Benoit was used by *Hustler Magazine*, and that no consent therefor was given by Plaintiff Administrator. However, the crux of this case, as conceded by Plaintiff, is whether the publication of Benoit's pictures in the March 2008 issue of *Hustler Magazine* was for LFP's commercial benefit, as opposed to being used as part of a newsworthy article (Pls. Mem., pp.9-10), outside of the Georgia right of publicity.

Here, Plaintiff alleges in her Complaint that Benoit was a public figure at the time of her death (Complaint, ¶ 15). In her Opposing Memorandum, Plaintiff concedes that, "the subject matter of the article, namely the life and death of Ms. Benoit, is a legitimate matter of public interest and concern . . . ." (Pls. Mem., p.10). Accordingly, this issue is essentially concluded. The publication of the photographs of Benoit was used to illustrate a news story of legitimate public interest. Thus, not only did the article and photographs fall outside of the ambit of a violation of the right of publicity in Georgia, but it is protected by LFP's right of free expression under the First Amendment to the United States Constitution. As stated in Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578, 97 S.Ct. 2849, 2859 (1977): "There is no doubt that entertainment, as well as news, enjoys First Amendment protection."

Plaintiff makes a final attempt to salvage her claim by asserting the case of Titan Sports, Inc. v. Comics World Corp., 870 F.2d 85 (2d Cir. 1989). Said decision is cited for the proposition that a generally protected publication can still contain within it an item that constitutes commercial appropriation outside of First Amendment protection (Pls. Mem., p.10).

The Titan Sports case, decided under the New York privacy statute,[2] indicated that a photograph accompanying an article concerning a matter of public

[2]New York Civil Rights Law § 51.

interest could still be considered a commercial use, if the picture had no relationship to the article, or the article was in reality an advertisement in disguise. (87 F.2d at 88). There, defendant's wrestling magazine included unauthorized photographs of wrestlers printed in color on pages four times as large as the pages comprising the balance of the publication; up to 10 such photos would be folded and stapled into the center of the publication and viewable only upon removal of the staples and the posters from the magazine. The cover of the magazine would state: "10 FULL COLOR WRESTLING POSTERS! HUGE SIZE!" or similar variation (870 F.2d at 86) as an obvious advertisement.

The Second Circuit therein stated that photographs marketed as posters could be deemed to be used for purposes of trade. While news photos are entitled to full First Amendment protection, whether in that case the defendant's large photographs would be considered as posters, distributed by defendant for purposes of trade as a subterfuge for commercial exploitation, was a decision to be left to the trial court on remand. (870 F.2d at 88).

Here, the photographs of decedent Benoit inside *Hustler Magazine* are not posters or oversize pictures, but part of an article of conceded public interest concerning a public figure in a magazine. Plaintiff objects, and invites the Court to take judicial notice that "the essence of Hustler's 'business' is publishing salacious, overtly nude and partially nude photographs of women." (Pls. Mem..

p.11). However, that inflammatory statement is simply not relevant to this lawsuit. As stated in LFP's original Memorandum (pp.10-11), even indecent sexual expression, if not obscene, is protected by the First Amendment. See, e.g., Reno v. American Civil Liberties Union, 520 U.S. 844, 874-875, 117 S.Ct. 2329, 2346 (1977).

In sum, as a matter of law, LFP's publication of the subject photographs of Nancy Benoit in the March 2008 issue of *Hustler Magazine* was not for a commercial purpose, did not violate the Georgia right of publicity, and was fully protected under the right of Freedom of the Press guaranteed by the First Amendment to the United States Constitution.

CONCLUSION

For the reasons set forth herein, and in Defendant LFP's original Brief, Plaintiff's Complaint fails to state a claim for relief, and LFP's motion to dismiss pursuant to Rule 12(b)(6) should be granted.

Dated: May 1, 2008

Respectfully submitted,

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RULE 7.1(D) CERTIFICATION

I hereby certify that the foregoing Reply Brief Supporting Defendant LFP Publishing Group, LLC's Motion to Dismiss was prepared in Times New Roman 14 point font in compliance with L.R. 5.1(B).

This 1st day of May, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of **REPLY BRIEF SUPPORTING DEFENDANT LFP PUBLISHING GROUP, LLC.'S MOTION TO DISMISS** will be served upon Plaintiff in the above-captioned action through the CM/ECF electronic filing system at the email address below:

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This 1st day of May, 2008.

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